Supreme Court, U.S.
FILED
MAR 10 1998
CLERK

NO. 97-1311

In the Supreme Court of the United States

October Term, 1997

SCOTT JUDE BOURQUE

Petitioner,

V.

STATE OF LOUISIANA

Respondent

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the prosecution's repeated uncorrected comments to the jury, that their sentencing decision was the same as a recommendation and that the system would take over after their vote and that they would not be the ones to inflict the death penalty, violate the Fourteenth Amendment's guarantee of due process and the Eighth Amendment's requirement of a fair and reliable capital sentencing procedure?

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The Prosecution's Repeated Uncorrected Comments to the Jury, That Their Sentencing Decision Was the Same as a Recommendation and That the System Would Take Over After Their Vote and That They Would Not Be the Ones to Inflict the Death Penalty, Violated the Fourteenth Amendment's Guarantee of Due Process and the Eighth Amendment's Requirement of a Fair and Reliable Capital Sentencing Procedure.

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Cases Cited:

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985) 3,5,6

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CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States which provides in relevant part:

> [N]or [shall] excessive fines [be] imposed, nor cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

La.C.Cr.P. Art. 905.8, which provides:

> The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. _____

Scott Jude Bourque
Petitioner

Vs.

State of Louisiana
Respondent

Respondent's Opposition to Petition for
A Writ of Certiorari to the
Supreme Court for the State of Louisiana

The Respondent, State of Louisiana, prays that a writ of certiorari be denied to the judgment of the Supreme Court for the State of Louisiana.

CITATION TO OPINIONS BELOW

The judgment of the Louisiana Supreme Court in State of Louisiana v. Scott Jude Bourque, No. 96-0842, 699 So.2d 1 (La. 07/01/97) is attached as Appendix A to the Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Supreme Court for the State of Louisiana was entered on July 1, 1997. See State of Louisiana v. Scott Jude Bourque, No. 96-0842 (La. 07/01/97) 699 So.2d 1. Rehearing was denied on September 5, 1997. Id. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

On April 15, 1990, Scott Jude Bourque murdered his estranged girlfriend, Charlotte Perry, and severely wounded her mother, Theresa Stoute. Just prior to this murder and attempted murder, Scott Jude Bourque murdered Jasper Fontenot and then drove to the home of Perry and Stoute to commit those crimes. Mr. Bourque was indicted and subsequently convicted of first degree murder of Charlotte Perry by a St. Martin Parish Jury and was sentenced to death. On appeal to the Louisiana Supreme Court, the conviction was affirmed but the sentence was reversed and the case was remanded for another sentencing hearing. State v. Bourque, 622 So.2d 198 (La. 1993).

Venue was then changed to St. Mary Parish, Louisiana, and following a second sentencing hearing, a jury again unanimously determined that Bourque should be sentenced to death. On appeal to the Louisiana Supreme Court, the sentence was affirmed. State v. Bourque 699 So.2d 1 (La. 1997). The petitioner now argues that the Louisiana Supreme Court erred in affirming the sentence because of alleged misconduct by the prosecution in the statements to the jury concerning alleged diminished responsibility of the jury in imposing the death penalty. The State of Louisiana shows that the petitioner is incorrect in his allegation of alleged prosecutorial misconduct and diminished capacity of jury responsibility.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTION'S REPEATED UNCORRECTED COMMENTS TO THE JURY, THAT THEIR SENTENCING DECISION WAS THE SAME AS A RECOMMENDATION AND THAT THE SYSTEM WOULD TAKE OVER AFTER THEIR VOTE AND THAT THEY WOULD NOT BE THE ONES TO INFLICT THE DEATH PENALTY, VIOLATED THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS AND THE EIGHTH AMENDMENT'S REQUIREMENT OF A FAIR AND RELIABLE CAPITAL SENTENCING PROCEDURE.

The Louisiana Supreme Court properly stated the facts of this case and applied the correct standard clearly established in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86L.Ed.2d 231 (1985). Caldwell held that the jury must not be misled regarding the role it plays in the sentencing decision. See 472 U.S. at 226, 105 S.Ct. At 2643.

This Court should understand that the petitioner is trying to persuade this Court to believe that a few isolated incidents with the jury in voir dire examination would rise to the level of a challenge under Caldwell, supra. The petitioner cites to this Court three instances in which the prosecution used the word recommendation interchangeably with the word determination. The petitioner also alleges that in a colloquy with a prospective juror, the prosecution attempts to diminish the responsibility of the jury. The colloquy cited by the petitioner is:

> "... You understand that what happens is if you make a recommendation, that is the end of your responsibility as far as the court proceedings. The Judge does what he has to do and the system does what it has to do; so

> you are not going to be the one who will be inflicting the death penalty. You are going to be recommending something to the Court." (TR 2048 - 2049).

The defendant goes on to cite two other isolated incidents.

Voir dire examination in the resentencing of Scott Jude Bourque lasted eight days. The defense would have this Court believe that these three statements by the prosecution so tainted the jury as to diminish their responsibility. The respondent argues that this is not so.

The respondent shows that the trial court repeatedly instructed the jury as to their responsibility. Prior to the voir dire of each panel the judge explained the responsibility of the jurors in language such as, "Your job will be to decide whether the defendant should be sentenced to death or to life imprisonment without benefit of parole, probation, or suspension of sentence. It will be your job to consider the circumstances of the events and the character and propensities of the defendant in determining the sentence to be imposed." The trial court also gave the following instructions to the entire jury prior to deliberation:

> (Tr. Vol.14, Page 3636, Lines 27-32, and Page 3637, Lines 1 and 2)
> "Now the defendant has been found guilty of first degree murder. You must decide whether the defendant should be sentenced to death or to life imprisonment without benefit or probation, parole or suspension of sentence. You must consider the circumstances of the offense and the character and propensities of the defendant in the sentence to be imposed.
>
> Tr. Vol. 14, Page 3637, Lines 11-15)
> Now in reaching your decision regarding the sentence to be imposed, you must be guided by these instructions. You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed.

(Tr. Vol. 14, Page 3638, Lines 6-10)
Now if you find beyond a reasonable doubt that an aggravating circumstance existed, you may consider imposing a sentence of death. The finding of an aggravating circumstance does not mean that you must impose a death penalty.

(Tr. Vol. 14, Page 3638, Lines 16-19)
If you find the existence of an aggravating circumstance, you must each also consider any mitigating circumstance before you decide that a sentence of death should be imposed.

(Tr. Vol. 14, Page 3639, Lines 18-22)
Also, even if you unanimously find that no mitigating circumstance exists, the law permits you--the jury--to impose a sentence of life imprisonment without benefit of parole, probation or suspension of sentence.

(Tr. Vol. 14, Page 3642, Lines 2-7)
In the event you unanimously decide the death penalty should be imposed, a space is provided on the form for you to write the statutory aggravating circumstance or circumstances you unanimously find to exist.

(Tr. Vol. 14, Page 3642, Lines 27-32)
It is your responsibility, in accordance with the principles of law that I have instructed you on, to determine whether the defendant should be sentenced to death or life imprisonment without benefit of probation, parole or suspension of sentence.

(Tr. Vol. 14, Page 3642, Lines 1-4)
All twelve of you must agree to return a verdict determining that the defendant be sentenced to death or to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.
(Emphasis added)

It is clear that the trial court did not diminish the responsibility of the jury.

The jury verdict form given to the jury also clearly delineates that it is the jury's responsibility to determine whether or not to impose the death penalty with the language: "...**THE JURY UNANIMOUSLY DETERMINES THAT THE DEFENDANT SHOULD BE SENTENCED TO DEATH.**"

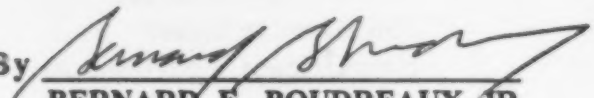
The respondent argues that the comments made by the prosecutor in this case do not rise to proscribed level which would induce the jury to believe that the responsibility for determining whether or not to impose the death penalty rests elsewhere. In Caldwell, supra, the prosecutor's remarks were made to the jury in the rebuttal closing argument and were contained in some of the last things said to the jury. The trial court in Caldwell, supra, also allowed the comment and agreed with the comment by the prosecutor without some limiting instruction.

In the case at bar, the prosecutor's comments were made in these short statements over eight days of voir dire examination. It was not eluded to at every opportunity by the prosecutor. Additionally, it was never mentioned in the opening statement, in the presentation of evidence or in closing argument. The jury was properly instructed by the trial court, both in voir dire and at the close of the evidence and arguments. This trial jury was not misled or other role minimized in any way by the trial court. The prosecutor's comments do not constitute reversible error under the Caldwell standard and the application for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent requests that the Court deny the writ of certiorari.

BERNARD E. BOUDREAUX, JR.
District Attorney
16th Judicial District

By 
BERNARD E. BOUDREAUX, JR.
District Attorney
16th Judicial District

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rule 29, that a copy of the Respondent's Opposition to Petition for Writ of Certiorari filed on behalf of the State of Louisiana has been served upon:

Honorable Gary P. Clements
Counsel for Petitioner
636 Baronne Street
New Orleans, Louisiana 70113

and

Honorable Richard Ieyoub
Attorney General
Dept. Of Justice - Criminal Division
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by placing the same in the U.S. Mail, first-class, postage prepaid, on this 9th day of March, 1998.

BERNARD E. BOUDREAUX, JR.